TABLE OF CONTENTS

8 - 80	Tide 3% U.S.C. Sentions 198, 110, 201, 701	
Citation	Objo Regised Code Seetisms 5919 no 0500	ı
Brief of	Other Respondents Adopted 218d 80 8188 2	1
Questio	ns Presented Character From the total origin Held	2
Reasons	for Denying the Writ 8201 S	1
1.	The Eleventh Amendment	3
2.	Executive Immunity	,
7	Application of Rule 8, Federal Rules of Civil Procedure 22001 Init to solud Israbed 5 olud	,
7 4.	Reviewability by Federal Courts of a Gover-	
L PAF	nor's Determination of Need to Call Out Units of the National Guard	1
5.	National Guardsmen as Agents of the State10)
6.	increasing in the contract of	
Conclus	tion12	1
Affidavi	Arnele 1. Section 8 it of Serviceeninent	1
V.A.	CATALLY OF CITATIONS	
Baker v	. Carr, 369 U.S. 186 (1962)	
Cheroke	ee Nation v. Georgia, 5 Pet, 1 (1831)	1
	te Young, 209 U.S. (1908) 3	
Ind	lotor Company of Treasury Department of liana, 323 U.S. 459 (1944)	
(19	Northern Insurance Co. v. Read, 322 U.S. 47,	,
	y v. Madison, 1 Cranch 137 (1803) 8	1
And the second second second	v. Peabody, 212 U.S. 78 (1909) 5	Ċ.
Sterling	v. Constantin, 287 U.S. 378 (1932)6)

STURFICE AND ISAT

has a mobile	e 32, U.S.C., Sections 108, 110, 501, 701 9
OPI	6 Revised Code, Sections 5919.02, 5919.05; 10175170
	il Rights Act of 1871, 17 Stat. 13, 48 U.S.C., Sec. 10
8	1983 עייעי אוני ביינים
8	L. Othe Elevenia Amendment
3	2. Esservitive accounting
Rul	e 7, Federal Rules of Civil Procedure 7
Rul	e 6, Federal Bules of Civil Procedure 2011 2 7
Rul	e 12, Federal Rules of Civil Procedure 7
01	3. National Guardiness as Agents of the State
11	U.S. CONSTITUTION INVISIT?
Art	venth Amendment
Ele	venth Amendment3
	CITATIONS
	Baker u. Carr. WONTWINEMED OUNG
Art	icle III, Section 10
	Consum to Author 367 U.S. 453 (1638) Consumer Services
	and moved Company Stratemy Department of
Mo	ore's Federal Practice
, 38 . 38	Creat Mountain Lasticates of Congress of the
	Markey a madison, LyC sock 1877 (1862)
2	Mover v. Pealodg, 312 V S. 18 (1909)
n	Sterling of Consignition 2014 7108 278 (1982) A Consignition 2014 7108 21982)

IN STEE

Counsel for Respondent James Counsel viewal capacity) which Restondent

sotion scopts and Ohio at the comme AC aCT incorporates herein the Brief in Omostron to the Peti-

was Covernor of

tion filed with the control of the state of Brown and Johes, Counsel or the Remondants

are the stopen JAMES RHODES, Governor to the HI in set fortis in be old of lovelate eit to med Respondents

A SYLVESTER DEL CORSO, Adjulant General Shodes (he braid landtall oid ent be dent Rhodes)

ROBERT CANTERBURY, Assistant Adjutant General

of the Ohio National Quard, of for bluods HARRY D. JONES, a Major of the Ohio National Guard

JOHN E. MARTIN and RAYMOND J. SEP.

Ceptains of the Ohio National Guard

VARIOUS OFFICERS and ENLISTED MEN. members of G Company, 107th Armored Cavalry

Regiment and A Company, First Bettalion, 145th Infantry Regiment of the

Chie National Guard, and ROBERT WHITE President, and short wilder to Kent State University, and no relate on the Respondents as a Respondents of Chin, thereby falling

BRIEF OF DEFENDANT-RESPONDENT JAMES A. BHODES IN OPPOSITION TO formation FOR THE SPANE CHECUT

One of the Civil Highle Act of 1874, 17 Stat. (3, 42 U.S.C. 91983 equinst the Covernor of Ohlow Astulants

BRIEF OF STREET RESPONDENTS ADOPTED

Counsel for Respondent James A. Rhodes (in his individual capacity), which Respondent was Governor of Ohio at the commencement of this action, adopts and incorporates herein the Brief in Opposition to the Petition filed in this Court by Charles E. Brown, Counsel of Record for the Respondents; Robert F. Howarth, Jr. and William W. Johnston of Crabbe, Newlon, Potts, Schmidt, Brown and Jones, Counsel for the Respondents.

In supplement to the statements and arguments therein set forth in behalf of such of the named Respondents as were served with process, Respondent James A. Rhodes (hereinafter referred to as Respondent Rhodes) presents additional grounds why Petitioner's cause should not be reviewed by this Court do

HARRY D. JONES, a Major CEYNSEST SNOTTESUO

- 1. Whether an action brought in a United States District Court under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. Section 1983, against the Governor and other officers of the State of Ohio, which specifically charges each of the named defendant state officials with personal wrongdoing causing deprivation of Constitutionally secured rights, and which demands money damages from each individually, making no claim on the Treasury of Ohio or any public funds, is an action against the State of Ohio, thereby falling under the Eleventh Amendment's prohibition against suit of a State in a federal court.
- 2. Whether there is a doctrine of unqualified executive immunity which immunities state officials from personal hability for deprivations of rights, privileges and immunities secured by the United States Constitution and, if so, whether, in an action brought under Section One of the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1983, against the Governor of Ohio, Adjutant

General of the Ohio National Guard officers and enlisted men of the Ohio National Guard and the President of a state university, such a doctrine mandates the entright dismissal of a complaint charging each with specific personal wrongdoings causing deprivations of constitutionally secured rights.

3. Whether a United States District Court, pursuant to Rule 8 of the Federal Rules of Civil Procedure, when deciding a motion to dismiss a complaint based solely on the sufficiency of its allegations, is required to take its

allegations as true, a bathalle selfact tentions appoints of

A to Whether Federal Courts have jurisdiction to review a Governor's determination, pursuant to his State's Constitution and laws, that it is necessary to order units of the National Guard into service to assist civil authorities in putting down civil disorders.

5. Whether officers and enlisted men of the Ohio National Guard, upon being ordered to duty by the Governor to suppress riots, can in any circumstance be deemed agents of the Governor rather than agents of the

State of Ohio and the United States of seereque of

6. Whether injury caused by an act or omission of a member of the Ohio National Guard can be imputed to the Governor, rather than to an intervening cause, where it is not shown that such act or omission was embraced within orders issued by the Governor in calling units of the National Guard to active duty.

REASONS FOR DENYING THE WRIT

by Charles E. Brown, Robert F. Howarth, Jr. : W. Johnston topologyana, dinayel ed .1

MAWare that nothing so catches the attention of this Court as a hald assertion that the Court below has ruled directly in conflict with controlling decisions of this Court the Petitioner asserted that the Court of Appeals failed to follow the principle "firmly established in Expense Young, 209 U.S. (1908). A that a State official

constitution loses any shield of immunity otherwise possessed by the State."

Ex Parte Young lays down a far narrower principle, one that the Court of Appeals correctly found to be "inapposite". What Ex Parte Young stands for is that "" individuals who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a Federal Court of equity from such action." Ex Parte Young, 209 U.S. at 155.

As Chief Judge Weick observed in the Court of Appeals' opinion herein, "Ex Parte Young " " was an action for injunction " ". Our case, on the other hand, is an action for damages and also involves the question whether the Federal Courts should interfere with the performance by the State's chief executive of his highest duty to suppress riots of insurrections and protect the public." (Appendix to Petition for Certiforari, page 12a.) Moreover, Governor Rhodes' calling out the National Guard on April 29, 1970, constituted a completed exercise of office, and thus a completed act of the State, not a threatened action "under color of law."

Reasons why Ex Parte Young is not controlling herein are further elaborated in the Brief in Opposition filed by Charles E. Brown, Robert F. Howarth, Jr. and William W. Johnston for the Respondents.

Petitioner's quotation (at page 11 of her Petition) from Justice Reed's Opinion for a unanimous Court denying estitiorari in Ford Motor Co. v. Treasury Department of Indiana, 323 U.S. 459 (1944) is irrelevant and misleading. There the action was held to be against the State and het multiple because the State had not consented to be sued in Pederal Court. The same triblevalley characterious the reterence to Great Northern Institutes. Co. v. Read, 325 U.S. 47 (1944); reterred to at page 15 of the Petition.

2. Executive Immunity (points)

Counsel for Respondent Rhodes leaves to the Briefs in Opposition filed in behalf of all Respondents, argument as to the full thrust and scope of executive immunity. For the purposes of this Brief, it should suffice to point out that this Court has unhesitatingly given the protection of executive immunity to a Governor who calls out the National Guard to put down disorder and insurrection and who issues to the Guard orders directed toward that end. Even Judge Celebrezze, in his dissent below, conceded:

"The Supreme Court has consistently ruled that the executive decision to still up the militia is conclusive, and in and of itself is not subject to judicial review."

(Petition for Certifrari, page 69a.)

What Judge Celebrezze concedes can fairly be construed to be the import of Moyer v. Peabody, 212 U.S. 78 (1969), which, like the instant case, was an action brought under the Civil Rights Act to recover damages from a former Governor (of Celorado) for a trespass against the Plaintiff. The complaint was dismissed on deshurter. Certiorari was decided, and the Court, speaking by Justice Holmes, said in part:

"As no one would deny that there was immunity for ordering a company to fire upon a mob in insurfection, and that a State law authorizing the Governor to deprive citizens of life under such circumstances was consistent with the 14th Amendment, we are of opinion that the same is true of a law authorizing by implication [the imprisonment ordered in this case]."

Moyer v. Peabody, 212 U.S. 78 at page 85.

In Sterling v. Constantin, 287 U.S. 378 (1932), this Court dismissed an appeal from an order enjoining the Governor of Texas from using the National Guard to enforce oil production quotas, but in so doing, referred to and approved Moyer v. Peabody, supra, in these words (Chief Justice Hughes, at bare 399)

By virtue of his duty to cause the laws to be faithfully executed, the Executive is appropriately vested with the discretion to determine whether an exigency requiring military aid for that purpose on has arisen. His decision to that effect is conclusive."

Chief Justice Hughes then carefully distinguished the Governor's executive immunity, acknowledged when he calls out the National Guard and acts to suppress disorders and breaches of the peace, from the case before him in which the Governor of Texas sought to use troops to regulate the production of oil. (Pages 401, 402)

In the District Court, Petitioner herein sought to insulate her complaint from dismissal for want of jurisdiction by extravagant conclusionary allegations that Respondent Rhodes "recklessly wilfully, and wantonly," and outside the scope of his office.

ordered the Ohio National Guard to duty on the

Kent State University's main campus;

"—ordered members of the Ohio National Guard to break up all assemblies without regard to their law-The complaint wabna seemen on

engaged in misconduct and caused Plaintiff's decedent to be shot and killed," him we mind enitarit vo

Such accusations were "reckless, wilful and wanton" on the part of the pleader. They were instantly negated by facts of which the District Court took judicial notice, triggered by the incorporation into the Motion to Dis-miss of Respondent Rhodes' Proclamations as Governor

by implication (the imprisonment ordered in this Casel on April 20 and May 5, 1970, reciting the necessities that gave rise to the use of National Guard troops in aid of the givil authorities. (Petition for Certiorari, page 23a and 25a) Senior Circuit Judge O'Sullivan's impatience in his concurring opinion, with such extravergantly conclusionary pleading has been interpreted by Petitioner's Counsel with curious distortion, as indicating "a purpose to cripple the Civil Rights Act", (Petition, page 13, note 12.) the page 11 but ashould trabungsell up

Motion to Disense filed by all Respondents and Civil Procedure (1) by Rotton of Rule (1) ways: (1) by Rotton of Rule (1) by Rotton o

Petitioner's question No. 3 asks simply whether the United States District Court, pursuant to Rule 8 of the Federal Rules of Civil Procedure, when deciding a Motion to Dismiss a complaint based solely on the sufficiency of its allegations, is required to take its allegations as true.

The answer, of course, is in some instances "Yes"; but in the Complaint of Petitioner Scheuer against Respondent Rhodes in the United States District Court for the Northern District of Ohio, the answer is "No", the state of the Court for the Court for

Rule 8 covers many things, but our prime concern is with Rule 8(d), which provides in its first sentence:

Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading."

Rule 7(a) tells us that a Complaint requires a responsive pleading, but Rule 12(b) authorizes the defense that the Court lacks jurisdiction over the subject matter to be presented by motion.

After defining a "speaking motion" as one that to be sustained, requires reference to facts not appearing on

Process of the pleating attacked, Moore's Federal Process in the treatment of Rule 12(b) of Federal Rules of Carl Processing (Volume 2A, page 2208), states hady that a majority of decisions under Rule 12(b) approves the use of a speaking motion to state the defense of lack of jurisdiction over the subject induce of the action. Such defense was confiding in the first branch of the separate Motion to Dismiss filed in the District Court by Respondent Rhodes, and it was also the basis of the Motion to Dismiss filed by all Respondents.

Both Motions to Districts "spoke" in two ways: (1) by incorporating the texts of the two Proclamations issued by Respondent Receive as Governor on April 29 and May 5, 1970, ordering into active service units and personnel of the National Chard, and (2) having thus placed the Proclamations before the Court, facilitated the Court's taking judicial notice of matters of public record and common knowledge with respect to events on the Kent

The answer of 1 year against against Respon-

Roll-wildley by Poleta Could of a Coverage of the Determination of Roll to Call Out Trained to Rule 8 covers manufactured through the coverage and the Call of the

A long fine of Federal cases has for years yielded to the Enerative the decision of political questions. Typical of the cases were Grecokee Nation v. Georgia, 9 Pet. 1; Marbury v. Madison, 1 Cranch 197; and Coteman v. Miller, 307 U.S. 433. Then came Justice Brennan's Opinion in Buker v. Carr. 391 U.S. 186 (1982) that seemed to exclude for the future the argument that a case like the hastant one against Respondent Rhodes should be treated as non-justiciable on the ground that a decision to call out the National Quard in political. The Brief in Opposition had kerein by Charles E. Brown.

Robert F. Howards, Jr. and William W. Johnston, in behalf of all Respondents, logically established that Respondents dent Rhodes' decision as Governor to dispatch Ohlo National Guard units to the Main Campus of Kent State University on April 29, 1970, as a "political decision" sascitional by the Constitution of the United States and not affected by the Baker v. Carr ben.

Stated succincity, Asticle I, Section 3. Chause 16 of the U.S. Constitution empowers Congress to "provide for organizing," string and disciplining the Militia, "reserving to the States, respectively, the Appointment of the Officers and the Authority of training the Militia stcording to the discipline prescribed by Congress." Congress has so provided in Title 32, United States Code, and has stated that:

lose its National Guard money" (Section 105);
"The President shall be the source of regulations and orders to organise discipline, and govern the National Guard" (Section 110);

"—the discipline, including training, of the Army National Guard shall conform to that of the Army and the discipline of the Air National Guard to that of the Air Force" (Section 501);

Army and Air Porce type useforms, respectively" (Section 701).

It is, therefore clear that Respondent Rhodes' chiling out the Malienal Guard was in a context test status the indicate of a political question as defined by Justice Brennam: "Prominent on the surface of any case held to involve a political question is found a featurally demonstrable constitutional commitment of the insue to a co-ordinate political department ** "" Bullet as Cary, 369

U.S. 186 at 217 (1962). In this instance, the "coordinate political department" is the Executive, i.e., the Presidency to describe of the presidency to describe a political described as political described

tional Guard units to the Main Campus of Kent State

By force of Article III, Section 10 of the Constitution of the State of Ohio, the Governor is "Commander-in-Chief of the military and naval forces of the State, except when they shall be called into the service of the United States". Chapter 5919 of the Ohio Revised Code states the composition of and provides for the organization, discipline and training of the Ohio National Guard That chapter is interwoven with requirements set forth in Title 32, United States Code, and in Regulations issued by the President, Section 5919.10. Ohio Revised Code, specifies the form of contract with the State of Ohio and the United States that each man enlisting in the Ohio National Guard must sign. The text of that section, continuously in force since September 9, 1957, reads as Vational Guard" (Section 110): follows:

guard shall sign an enlisting in the Ohio national guard shall sign an enlistment contract and subscribe to the following oath of enlistment: I do hereby acknowledge to have voluntarily enlisted this day of 19 as a soldier in the national guard of the United States and of the state of Ohio, for a period of year under the conditions prescribed by law, unless sooner discharged by proper authority. And I do solemnly swear that I will bear true faith and allegiance to the United States of America and to the state of Ohio, and that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the president of the United States and of the governor of the state of Ohio, and of the officers appointed over me according

lus tary juitice? This section shall not apply to perlus tary juitice? This section shall not apply to perion sonnel transferred or assigned to the Ohio national guard under the laws and regulations of the United is a States of maintain of sections of the United

From the foregoing, it is obvious as a legal matter that any enlisted man in the Ohio National Guard at times relevant to this action was by contract an agent of the State of Ohio and of the United States, and was not an agent of Respondent Rhodes individually.

Similarly, officers in the Ohio National Guard are agents of the State of Ohio and of the United States by force of Article I, Sec. 3, Clause 16, of the United States Constitution, heretofore quoted at page 9. Implementing the United States constitutional provision are Sections 5919.02, 5919.05, 5919.06 and 5919.071 of the Ohio Revised Code. Section 5919.05, containing the officer's Oath of Office, makes the Principal Agent relationship clear.

Respondent James A. Rhodes.

The orders issued by Respondent Rhodes in his official capacity as Governor and Commander-in-Chief were those placing units of the Ohio National Guard on active duty as reflected in his Proclamations of April 29 and May 5, 1970. Those orders did not specify which units were to be called up, whether the officers and men in them were to carry guns loaded with live ammunition or not, or whether they were to break up assemblies. It thus cannot be argued that Governor Rhodes issued orders in excess of his powers as Governor and that such excess is imputable to Respondent Rhodes as an individual. There was no excess in the orders reflected in the Proclamation.

it is not conceded that any act of Respondent Schodes was negligent wilful manion reckless or otherwise culpuble. Any allegation to the contrary is a conclusion of the Petitioner But even if it were conceded that he was negligent or even reckless in ordering the National Guard to the Main Campus of Kent State University, it sould not rationally be further concluded that such order was the proximate cause of any damage to persons present on the Campus, when such damage was patently caused by an intelligent, independent, intervening act Strellary, officers in the Onio stredto ro redtors lo

greats of the State of Ohio and of the United States by CONCLUSION

Potitioner's case presents no Federal question of substance for review by this Court. Therefore, the writ preyed for should be denied and his prose the orest

ded a ser no a Respectfully aubmitted and and have

neels of the market and the Brooks Alloward and to be Counsel of Record for Respondent James A. Rhodes. Intervening Carso

those clacies of the black send

Isiafflo and at AFFIDAVIT OF SERVICE

cauncity as Covernor and Countardi State of Ohio County of Franklin

duty en reflected in his Proctama L. R. Brooke Alloway, Senior Partner in the farm of Tepper, Allowey, Goodman, Delcone and Duffey, Counsel of Record for Respondent James A. Rhodes, herein, hereby certify that on this 24th day of January, 1973, I served three certies of the foregoing Brief of Defendant. Respondent James A. Rhodes in Opposition to Petition for Writ of Centioners to the United States Court of Appeals for the Sixth Circuit on Michael E. Geltner, American Civil Liberties Union of Ohio Foundation, Inc., 203

East Broad Street, Columbus, Ohio, 43215, Counsel for the Petitioner; Melvin L. Wulf. Sanford Jay Rosen, Joel M. Gora, American Civil Liberties Union of Ohio Foundation, Inc., 22 East 40th Street, New York, New York, 10016; Nelson G. Karl, 33 Public Square, Cleveland, Ohio, 44113, and Walter S. Haffner, 1008 Standard Building, Cleveland, Ohio, 44113, additional attorneys for Petitioner, no Counsel of Record having been designated: Charles E. Brown, Counsel of Record for Respondents Del Corso, Canterbury, Jones, Martin and Srp. 42 East Gay Street, Columbus, Ohio, 43215; C. D. Lambrose, Esq., 750 Prospect Avenue, Cleveland, Ohio, 44115, Attorney for Raymond J. Srp; and Delmar Christensen, Esq., Attorney for Harry D. Jones and John E. Martin, Respondents herein, by depositing the same in a United States mailbox, first class postage prepaid, addressed to each of the attorneys above at his designated address, being the only parties hereto required to be served.

R. BROOKE ALLOWAY,
Counsel of Record for
Respondent James A. Rhodes.

Subscribed and swon to before me this 24th day of January, 1973.

JOHN M. McELROY, Attorney At Law Notary Public—State of Ohio My commission has no expiration date. Section 147.03 R. C.

Supreme Court of the United States

OCTOBER TERM, 1972

MICHAEL RODAK, JR., CLERK

JAN 27 1513

No. 72-914

SARAH SCHEUER, Administratrix of the Estate of Sandra Lee Scheuer, Deceased, Petitioner,

V.

JAMES RHODES, Governor of the State of Ohio, SYL-VESTER DEL CORSO, Adjutant General of the Ohio National Guard, ROBERT CANTERBURY, Assistant Adjutant General of the Ohio National Guard, HARRY D. JONES, a Major of the Ohio National Guard, JOHN E. MARTIN, and RAYMOND J. SRP, Captains of the Ohio National Guard, and ROBERT WHITE, President, Kent State University,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS DEL CORSO, CANTERBURY, JONES, MARTIN, SRP, AND WHITE IN OPPOSITION

CHARLES E. BROWN, Counsel of Record ROBERT F. HOWARTH, JR., Of Counsel WILLIAM W. JOHNSTON, Of Counsel 42 East Gay Street Columbus, Ohio 43215
DELMAR CHRISTENSEN Second National Bank Building Akron, Ohio 44308
Attorney for Harry D. Jones and John E. Martin C. D. LAMBROSE 750 Prospect Avenue Cleveland, Ohio 44115
Attorney for Raymond J. Srp

Attorneys for Respondents

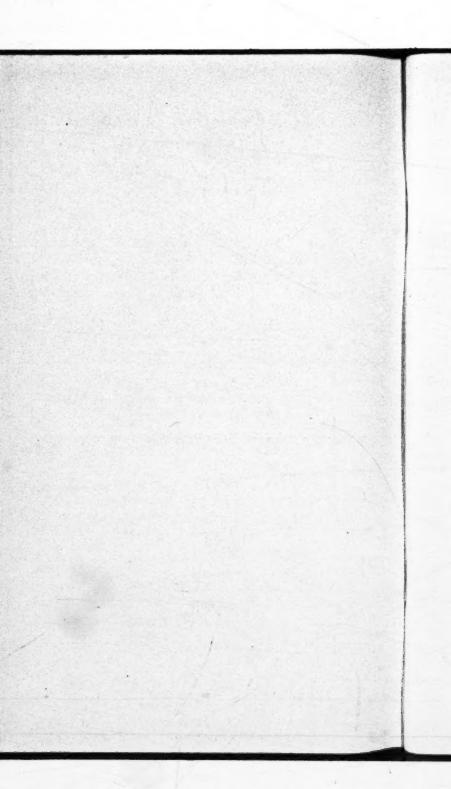


TABLE OF CONTENTS

	HTML (1.4) [10] [12] [12] [12] [12] [12] [12] [13] [13] [13] [13] [14] [15] [15] [15] [15] [15] [15] [15] [15	Page
	OF AUTHORITIES	iii
THE RESERVE THE PARTY OF THE PA	ONS PRESENTED	1
	TUTIONAL PROVISIONS AND STATUTES	
	IENT OF CASE	7
	RY OF ARGUMENT	9
ARGUM		10
I.	The Lower Court Properly Considered the Complaint's Allegations	10
	A. Is a United States District Court, in light of Rule 8, Fed.R.Civ.P., required to take a complaint's allegations as true when deciding a Rule 12b(1), Fed.R. Civ.P., motion to dismiss?	10
	B. Is a United States District Court, in light of Rule 8, Fed.R.Civ.P. required to take a complaint's allegations as true when deciding a Rule 12b(6), Fed.R Civ.P., motion to dismiss?	12
П.	The Lower Court Properly Dismissed the Complaint for Its Failure to State a Claim Upon Which Relief Could be Granted	12
	A. Under the facts of this case, does the Governor of the State of Ohio possess unqualified executive immunity for his discretionary acts vis-à-vis a 42 U.S.C. Section 1983 cause of action?	13
	B. Under the facts of this case, do the President of Kent State University, the Adjutant General of the State of Ohio, the Assistant Adjutant General of the State of Ohio and the named officers of the State of Ohio's organized militia possess qualified executive immunity vis-à-vis a 42 U.S.C. Section 1983 cause	
	of action?	13

		EDMINIOS NO SMALL	Page
western	m.	The Trial Court Lacked Subject Matter Jurisdiction	16
T A	IV.	The Allegations of Petitioner's Complaint Concerning the Propriety of Training Weaponry and Orders of the Ohio National Guard Raise Non-justiciable Political Ques- tions	i
91 01	V.	The Federal Government is an Indispensable Party to the Adjudication of Petitioner's Allegations Concerning the Training, Weap- onry and Orders of the Ohio National Guard	
CON	CLI	USION AND AND AND AND AND AND AND AND AND AN	. 28
AFF	TDA	VIT OF SERVICE	. 29

adr heatstedt grayers Project vall

assemble that Total and the communication and the communication and the second contraction of the contractio

and the characterist was such suff sales if

South the sea and the condition which

passo 2801 bassed 280 A secondar

TABLE OF AUTHORITIES

Page	•
Baker v. Carr, 369 U.S. 186 (1962)24, 2	7
Barr v. Matteo, 360 U.S. 564 (1959)20, 2	1
Birnbaum v. Trussel, 347 F.2nd 86 (2nd Cir. 1965) 14, 15	5
Carter v. Carlson, 447 F.2d 358 (D.C. Cir. 1971) cert. granted sub nom., District of Columbia v. Carter, 404 U.S. 1014 (1972)14, 1	5
Conley v. Gibson, 355 U.S. 41 (1957) 1	1
Cruz v. Beto, 405 U.S. 319 (1972) 17	1
Dugan v. Rank, 372 U.S. 609 (1963)17, 18, 22, 23	3
Ex parte New York, 256 U.S. 490 (1921)17, 2	
Ex parte Young, 209 U.S. 123 (1908) 23	
Fitts v. McGhee, 172 U.S. 516 (1899) 10	6
Ford Motor Co. v. Treasury Department, 323 U.S. 459 (1944)17, 23	
Franklin v. Meredith, 386 F.2d 958 (10th Cir. 1967) 1	5
Gilbert v. David, 235 U.S. 561 (1915) 1	1
Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944)1	6
47 (1944)	1
Haines v. Kerner, 404 U.S. 519 (1972) 1	1
Hans v. Louisiana, 134 U.S. 1 (1890)16, 1	7
Hoffman v. Halden, 268 F.2d 280 (9th Cir. 1959) 1	
Jenkins v. McKeithan, 395 U.S. 411 (1969) 1	1
Jobson v. Henne, 355 F.2d 129 (2nd Cir. 1966)14, 1	5
Jones v. Perrigan, 459 F.2d 81 (6th Cir. 1972)14, 1	5
Joseph v. Rowlen, 402 F.2d 367 (7th Cir. 1968)14, 1	
Lanzetta v. New Jersey, 306 U.S. 451 (1938) 2	2
Lumbermen's Mutual Casualty Company v. Rhodes, 403 F.2d 2 (10th Cir. 1968), cert. denied, 394 U.S. 965 (1969)	5

CHICAGO DO DOS	Page
McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir.	4, 15
McNutt v. General Motors Accept. Corp., 298 U.S. 17 (1935)	8 11
Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827)	22
Meredith v. Allen County War Memorial Hospital Commission, 397 F.2d 33 (6th Cir. 1968)	
Miranda v. Arizona, 384 U.S. 436 (1966)	22
Morgan v. Rhodes, 456 F.2d 608 (6th Cir. 1972) cer granted sub nom. Gilligan v. Morgan, —U.S —, 34 L.Ed.2d 217 (1972)	
North Pacific Steamship Co. v. Soley, 257 U.S. 21 (1921)	6 11
Parden v. Terminal R. of Alabama Docks Dept., 37 U.S. 184 (1964)	17
Re Ayers, 123 U.S. 443 (1887)	17, 18
Roberts v. Williams, 456 F.2d 819 (5th Cir. 1971) cert. denied, 404 U.S. 866 (1971), addendum 45 F.2d 834 (5th Cir. 1972)), 56 14, 15
Silver v. Dickson, 403 F.2d 642 (9th Cir. 1968)	15
Sostre v. McGinnis, 442 F.2d 178 (2nd Cir. 1971)	14, 15
Wetmore v. Rymer, 169 U.S. 115 (1898)	11
Whirl v. Kern, 407 F.2d 781 (5th Cir. 1968)	14, 15
CONSTITUTIONS AND STATUTES	
United States Constitution:	
Article I, Section 8, Clause 16	24
Article VI16,	22, 23
	passin
United States Code:	
Section 1331	10
Section 1343	10

	Page
Title 32	
Section 108	14/10/353
Section 110	. 25
Section 50124	, 26
Section 70124	, 26
Title 42	
Section 1983pa	ssim
Ohio Constitution:	
Article III, Section 10	. 18
Article IX, Section 3	18
Article IX, Section 4	. 18
Ohio Revised Code:	
Section 3341.01	19
Section 3341.02 (B)	. 19
Section 3341.04	19
Section 5919.02	19
Section 5919.05	
Section 5923.21	19
Section 5923.22	19
Section 5923.231	
Section 5923.99 (A)	19
TEXTS AND ARTICLES	
5 C. Wright and A. Miller, Federal Practice and Procedure, Civil Section 1350 (1967)	11
32 Am. Jur. 2d, Federal Practice and Procedure, Sections 170-172 (1967)	11
Comment, Civil Liability of Subordinate State Officials Under the Federal Civil Rights Acts and the Doctrine of Official Immunity, 44 CALIF L. REV. 887 (1956)	15

Advance to the property of the second tion where the source was a source

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-914

SARAH SCHEUER, Administratrix of the Estate of Sandra Lee Scheuer, Deceased, Petitioner.

V.

JAMES RHODES, Governor of the State of Ohio, SYL-VESTER DEL CORSO, Adjutant General of the Ohio National Guard, ROBERT CANTERBURY, Assistant Adjutant General of the Ohio National Guard, HARRY D. JONES, a Major of the Ohio National Guard, JOHN E. MARTIN, and RAYMOND J. SRP, Captains of the Ohio National Guard, and ROBERT WHITE, President, Kent State University,

Respondents.

BRIEF OF RESPONDENTS DEL CORSO, CANTERBURY, JONES, MARTIN, SRP, AND WHITE IN OPPOSITION

QUESTIONS PRESENTED

- 1. Respondents are satisfied with petitioner's first question presented for review (Pet. 3).
- 2. Respondents are not satisfied with petitioner's second question (Pet. 3) in that the question is predicated upon a legal conclusion never drawn by the court below. The following two questions are more properly brought to this Court for review:

¹For purposes of this brief in opposition, "Pet." together with Arabic numerals refers to pages of petitioner's petition for a writ of certiorari filed herein; "A." together with Arabic numerals refers to pages of petitioner's appendix appended to her petition for a writ of certiorari filed herein.